92-1773

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THELMA H. WALKER,

Petitioner,

vs.

STEPHEN R. WINDOM
AND THE LAW FIRM DBA
SIROTE & PERMUTT, ET AL,

Respondents

ON DECISION FROM
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD:

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QUESTIONS PRESENTED

1. Did the Supreme Court of Alabama deprive the Petitioner due process of law as guaranteed under Amendment XIV when it upheld the Circuit Court's granting of a summary judgment on her amended claim alleging that the Respondents obtained a consumer credit report on her under false pretenses, when there had been no motion for summary judgment on that cause of action by any party to the suit, no hearing on the matter and no sua sponte motion for summary judgment by the Court or notification to any party that the Court was considering a summary judgment on the matter?

2. Did the Supreme Court of Alabama abandon and ignore over 100 years of Alabama case law when it upheld summary judgment for a malicious prosecution claim in favor of the Defendants and did it come in direct conflict with the decisions of the court of last resort in the state of Kansas when its decision means that an attorney has no obligation to investigate the law and the facts before bringing suit against another party

and does this decision provide unequal protection under the law in favor of attorneys that initiate litigation maliciously?

3. Did the courts of Alabama illegally invade the province of the jury by issuing summary judgment, thereby depriving the Petitioner of the right of trial by jury, when they decided as a matter of law that the inference of malice could not be made by a jury even though there was before the court unrefuted evidence of a lack of reasonable investigation for the determination of probable cause before bringing suit?

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vs.

STEPHEN R. WINDOM AND THE LAW FIRM
OF SIROTE & PERMUTT, ET AL, Respondents

ON DECISION FROM
THE SUPREME COURT OF ALABAMA

Petitioner, Thelma H. Walker, respectfully prays that a writ of certiorari issue to review the opinion of The Supreme Court of Alabama refusing to reverse and remand for jury trial a summary judgment issued by the Baldwin County Circuit Court on complaints of malicious prosecution and obtaining a consumer credit report under false pretenses.

OPINIONS BELOW

The opinion of The Supreme Court of Alabama is contained in the attached Appendix, beginning at page 1. The denial of the application for rehearing for which no written opinion was issued is contained in the Appendix, beginning at page 8. The decision of the Circuit Court of Baldwin County is contained in the Appendix, beginning at page 9.

JURISDICTION

The opinion of The Supreme Court of Alabama was filed on December 11, 1992. A timely Application for Rehearing was filed on December 28, 1992. The Supreme Court of Alabama's denial of the Application for Rehearing was issued on February 5,1993.

This Petitioner has exhausted her judicial remedies in the highest court of Alabama and believes that the jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments VII and XIV to the United States Constitution are set forth in the attached Appendix on page 10; 15 U.S.C. 1681n, page 10; and 15 U.S.C. 1681q, page 10.

STATEMENT OF THE CASE

CONSTITUTIONAL ISSUES RAISED:

IN THE COURT OF FIRST INSTANCE: In the Circuit Court of Baldwin County, Walker raised the constitutional questions of a right to a trial by jury and equal treatment under the law following summary judgment rendered on January 2, 1992 in her Motion to Vacate Judgment entered January 31, 1992. The judge did not respond to the motion therefore ignoring the constitutional questions.

Walker again raised the constitutional questions of due process of law and right to a trial by jury in her Motion to Recuse filed on January 29, 1992. The Motion to Recuse was denied with no comment on the

constitutional issues.

Walker raised the constitutional issues of due process of law, equal treatment under the law and the right to a jury trial for the third time in her Motion to Reconsider Decision to Recuse filed February 18, 1992. The judge made no response of any type to the motion.

The issue of due process of law was brought up once again by Walker in her Motion for Expedited Hearing on her Motion to Vacate Judgment and Motion to Reconsider Decision to Recuse. The motion was filed with the Circuit Clerk on April 20, 1992. The judge made no response of any type to the motion.

IN THE SUPREME COURT OF ALABAMA: On February 20, 1992, Walker petitioned the Supreme Court of Alabama for a Writ of Mandamus, raising the issues of the right to a jury trial and equal treatment under the law. Attached to the Petition for Writ of Mandamus was a copy of her Motion to Recuse.

On July 30, 1992, in the Brief and Argument of the Appellant, Walker raised the questions of right to a trial by jury, equal treatment under the law and due process of law. The Supreme Court of Alabama issued its opinion on December 11, 1992 ignoring the constitu-

tional issues completely.

In the Appellant's Application for Rehearing, Walker argues again that she was illegally deprived of her constitutional right to a trial by jury, that she was not equally treated under the law or in accordance with the rules of the court and that she was deprived of a hearing on her complaint and denied due process of law. The Supreme Court of Alabama overruled Walker's application for rehearing. No opinion was issued.

GENERAL STATEMENT OF FACTS

On March 4, 1991 this Petitioner was served with both original and alias complaints served by First Alabama Bank as prepared, signed and filed by non-attorney employees of the law firm of Sirote & Permutt, P.C. Walker denied liability and filed a counterclaim against the bank and attempted to enjoin the attorney of record, Stephen R. Windom, and the law firm as additional parties to the suit. The circuit judge declined to enjoin the counsel of record or the law firm as additional parties to the suit. Walker represented herself and prevailed against the bank on their claim

and prevailed against the bank on her counterclaim.

Walker initiated a separate lawsuit against the law firm and Stephen R. Windom, the counsel of record and a state senator. After obtaining an interlocutory dismissal of the bank's claim on July 31, 1991 and before obtaining a final judgment against the bank, Walker amended her claim to include a separate cause of action for malicious prosecution, based on an arguable theory that the only decision that could be rendered in the bank's cause of action against Walker and her counterclaim against the bank would be a decision in her favor. The judge in the case against the law firm permitted no discovery against the Defendants and refused to issue an order compelling production of documents by the Defendants. The Defendants moved for summary judgment without an answer to the complaint or amended complaint on September 13, 1991. Subsequent to the Motion for Summary Judgment and while discovery continued in the bank's case against Walker, she discovered that attorney William McDermott, representing the bank on Walker's counterclaim, had obtained a consumer credit report on Walker under false pretenses. Windom was the attor-

ney of record for the bank's claim against Walker. She again amended her claim on November 15, 1991 for violation of 15 U.S.C. 1682q. The Defendants again failed to admit or deny the amended claim and did not request a summary judgment on the new cause of action. Circuit Judge James H. Reid, Jr. issued a summary judgment in behalf of the Defendants on January 2, 1992. There is no record of the Circuit Judge's making a sua sponte motion for summary judgment on the cause of action alleging the obtaining of a consumer credit report under false pretenses. Judge Reid refused to allow any oral arguments or further testimony subsequent to September 25, 1991.

Subsequent to Judge Reid's granting of the summary judgment, Walker learned that the Defendant Stephen R. Windom and other members of his law firm and Judge Reid had been involved in a series of transactions which defrauded Savings & Loan Institutions out of millions of dollars. Walker requested that the judge recuse himself because of the close business relationship maintained with the law firm. She further asked that the summary judgment be vacated and that the cause of action be reconsidered. Judge

Reid refused to recuse himself and Walker requested a Writ of Mandamus from The Supreme Court of Alabama. The Supreme Court of Alabama declined to issue the writ of mandamus. Judge Reid failed to rule on the Motion to Vacate Judgment and it was denied as an act of law after 90 days.

Walker filed notice of appeal to The Supreme Court of Alabama on May 27, 1992. After transmission of the Clerk of the Court's record on appeal, Walker learned that Judge Reid withheld all five depositions submitted to the Court as part of the record on appeal. Walker immediately furnished the Supreme Court with the depositions, but was unable to determine by the Supreme Court's actions whether such depositions were utilized by the Alabama Supreme Court.

The Supreme Court of Alabama affirmed the decision of the lower court on December 11, 1992. Walker filed her Application for Rehearing on December 28, 1992 requesting that the Supreme Court correct numerous errors in its statement of facts and that it reverse its wrongful affirmation. The Supreme Court overruled the Application for Rehearing, issuing no opinion.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the state court of last resort in Alabama has decided federal questions in a way that conflicts not only with its own decisions, but with those of appeals courts and courts of last resort in other states. The Supreme Court of Alabama has sanctioned judicial proceedings by a lower court that were radical departures from the accepted and usual course of judicial proceedings. The guarantees of due process of law, equal protection under the law and the right to a trial by jury have all been denied in this case.

The Petitioner was deprived of due process of law as guaranteed under Amendment XIV of the Constitution of the United States and the Alabama Rules of Civil Procedure 56(c) when The Supreme Court of Alabama upheld the Circuit Judge's granting of summary judgment in favor of the defendants on Petitioner's amended complaint that the defendants in the action had obtained a consumer credit report under false pretenses, a violation of 15 U.S.C. Section 1681q. The judge granted a summary judgment when there

had been no motion filed by either party on that matter and when no sua sponte motion for summary judgment was made known to either party that the judge was considering issuing a summary judgment on that matter.

The Defendants in the matter had issued a Motion to Strike, however the judge did not rule upon this motion, but apparently converted the motion to strike to a motion for summary judgment without notice. The Alabama Supreme Court specifically ruled in Hales v. First Nat'l. Bank of Mobile, 380 So.2d 797, (Ala. 1980) that the district court's conversion of motion to dismiss into motion for summary judgment without giving notice to nonmoving parties prior to entry of summary judgment was prejudicial error. The exact same principle of law applies in this instant case. In Hales the court says, "The concepts of notice, admissibility, and opportunity to be heard are ancient primaries."

In this instant case, the Supreme Court of Alabama has issued a decision which conflicts not only with its own rulings but with rulings issued in other states.

> "Due process of law applies to method of making judicial decision, as well as to protection of procedural and substantive rights." Kramer Trading Corp. of Texas v. Lyons, 740 S.W.2d 522 (Tex.App.-Houston [1st Dist.] 1987)

Since the Circuit Judge did not strike the amended claim, one may only conclude the amended claim was allowed and the granting of summary judgment without a hearing on the matter was a denial of due process of law. Once the amended claims have been allowed, it is improper to grant a summary judgment on the previous claims without consideration of the new cause of action. Perry v. Atkinson, 240 Cal.Rptr. 402; MacDonald v. Vasselin, 373 S.E.2nd 221 (Ga.App. 1988).

> "The right to be heard includes the opportunity to introduce evidence, to cross-examine witnesses, to be heard on questions of law and to have judgment rendered only after trial." Jordan v. Jordan, 653 S.W.2d 356, 368 (Tex.App.-San Antonio 1983)

Walker's constitutional rights have been denied since she was not granted these opportunities.

Alabama Rules of Civil Procedure required that a 10-day notice be given to the parties before the hearing of a motion for summary judgment. The court's ruling is in direct conflict with its previous decisions in Hales v. First Nat'l Bank, 380 So.2d 797 (Ala. 1980) and

Hightower & Co. v. United States Fid. & Guar. Co., 527 So.2d 698 (Ala. 1988).

When Alabama permits a denial of due process of law to Walker and she could have availed herself of due process of law as a resident of Texas or Georgia, she is denied equal protection under the law, a further violation of her constitutional rights.

Clearly the constitutional right of Thelma Walker to due process of law has been denied by the State of Alabama and that summary judgment which denied her due process of law is due to be reversed.

The Supreme Court of Alabama grievously erred when it affirmed the Circuit Court's decision for summary judgment on a claim of malicious prosecution. The Circuit Court illegally invaded the province of the jury thereby denying Walker the right to jury trial and violating Amendment Vli to the U.S. Constitution. Alabama abandoned over 100 years of case law when it decided that malice may not be inferred by a want of probable cause.

> "Malice may be inferred from the want of probable cause for setting the prosecution on foot." McLeod v. McLeod, 75 Ala. 483. "The want of probable cause may have been so apparent or palpable that the mind of the jury would be naturally led by that

> fact alone to conclude that the prosecution must have been malicious; whereas, on the other hand, the circumstances might have been such that though when closely weighed, and legal rules applied, they did not create probable cause, yet were sufficient to induce the mind of the jury to require further proof of malice. It is always a question for the jury whether a want of probable cause alone justifies an inference of malice; at least, if there is any evidence tending to show that there was such cause, or that the prosecutor honestly believed there was." Jordan v. Alabama G.S.R. Co., 81 Ala. 220 (Supreme Court of Alabama, Dec. Term, 1886).

The Alabama Supreme Court has consistently held for over 100 years that the jury may infer malice from the lack of probable cause alone and that it is for the trier of fact to make that inference. Since a jury trial had been demanded, the judge could not be the trier of fact.

Walker gave unrebutted testimony as to the lack of a reasonable investigation by Windom or any attorney prior to the preparation, signing and filing of the suit against Walker by his unlicensed employees. (See Appendix, pages 18-25). Walker's testimony was based on depositions of bank employees and the law firm's employees and those depositions were entered with the court in support of her testimony. In her testimony, Walker specifically detailed what documents were pos-

sessed by the law firm prior to the initiation of the suit and what documents they needed in order to form a reasonable opinion as to the possibility that she might be indebted to the bank. Walker's testimony specifically detailed the facts unknown to the law firm that would of necessity have to be known before forming an opinion as to probable cause and that they did not make any effort to obtain such knowledge through a reasonable investigation of the law and the facts. Walker offered unrebutted proof to the court that the attorney did not personally sign the complaint or alias complaint, a violation of rules of civil procedures, number 11. Alabama rule 11 is very similar in nature and content to Federal rule 11 and in an unpublished opinion in the case of Standard Guaranty Ins. Co. v. Fidelity & Deposit Co. of Maryland, U.S. Eleventh Circuit Court of Appeals, No. 92-2034, DC No. 91-835 CIV-T-17B, the court held that when the counsel of record did not personally sign the pleadings that they were to be treated as if they were unsigned. Walker's investigation and testimony before the court presented 19 other cases in which it was Windom's usual and customary procedure to allow other non-attorney employees of the law firm to sign

his name on complaints and affidavits. The fact that Windom did not personally sign the complaint and alias complaint is evidence from which a jury may make inferences as to whether Windom had read the complaint or had formed any opinion as to whether Walker was indebted to the bank. Walker's testimony and evidence put forth before the court absolutely documented the fact that no reasonable investigation whatsoever had been done. The Alabama Supreme Court's opinion on the case did not reject Walker's claim of malicious prosecution on the basis that the attorney had made a probable cause investigation and decision. Walker's allegation that there had been no investigation by Windom was unrefuted in any manner. Probably the most telling thing here is that Windom never denied that he failed to make an investigation of the law or the facts. The unlicensed person who prepared, signed and filed the complaint admitted she did not read their collection file. This is a textbook example of malicious prosecution in which the attorney made no investigation of the law or facts and does not deny the allegations. For purposes of summary judgment, the court must accept Walker's testimony as true.

Walker's testimony established clearly that there was no probable cause.

The Supreme Court of Kansas' decision in Hunt v. Dresie, 740 P.2d 1046 (Kan. 1987), is in direct conflict with the Supreme Court of Alabama's decision in this instant case. In forming its opinion, the Kansas Supreme Court quotes from other cases,

> "In the absence of probable cause, courts permit but do not direct juries to infer malice." Nelson v. Miller, 227 Kan. at 279. "The plaintiff's attorney in the original action may also be held liable for malicious prosecution." 227 Kan. at 276. This case goes on to state: "It is obvious that the client must rely upon his lawyer to make a reasonable investigation of his case. Likewise the attorney must accept the obligation to conduct a reasonable investigation in an attempt to find what the true facts are before filing a civil action on behalf of his client." 227 Kan. at 284.

When the attorney fails to investigate the law and the facts for the benefit of the client, he violates duties imposed upon him by the rules of the court. When his client suffers damages because the attorney has been negligent in his duties, his client may bring a malpractice suit against him. When his client's prevailing opponent suffers damages because the attorney failed to perform a reasonable investigation and form an opinion as to probable cause, that person may bring suit

against the attorney for malicious prosecution. Failure on the part of the attorney to investigate is negligence as to his client. It is also a reckless disregard for the rights of the client's opponent when, as a result of the attorney's failure to do a reasonable investigation, he brings a suit without probable cause. If the court simply applies the logic of the negligence toward his client to the other side of the question of malicious prosecution, the following quote from Hunt is outstanding.

> "The difficulty herein lies in the fact that the finding of negligence was made in a motion for summary judgment. Had the finding been made following a bench trial, we would be in an entirely different situation on appellate review. Whether or not defendants were negligent in filing the suits depends upon the totality of the circumstances as determined by the trier of facts. Because district judges and appellate court judges are, themselves, attorneys, they naturally have opinions as to whether or not certain conduct constitutes legal malpractice. It is easy to slip into the trap of deciding such questions "as a matter of law." Not having a like expertise in other professions such as medicine or architecture, the issues of professional negligence there are routinely submitted to juries. Nevertheless, claims of legal malpractice, like other forms of malpractice, are normally to be determined by the trier of fact rather than by summary judgment. We conclude that both the district court and the Court of Appeals erred in holding that defendant attorneys were negligent as a matter of law in filing the Note and Bank cases."

Likewise, it is routine in Alabama for over 100 years to submit the question of malice to the jury. The judge

cannot make the inference that there was a lack of malice when there has been a finding that there was no probable cause.

Further cited in Hunt was the case of Haverty v. Haverty, 35 Kan. 438, 444-45 (1886).

> "An attorney not guilty of misconduct or fraud will be protected, when he acts to the best of his skill and knowledge, and of course is not answerable for every error or mistake. He is legally responsible to his client only for the want of ordinary care and ordinary skill; but he must conduct him with honor and integrity."

Windom must answer to Walker for his failure to investigate the law and the facts and for the bringing of a suit against her without probable cause that caused her damages.

Walker claimed that Windom was forbidden to bring a suit against her by 15 U.S.C. Section 1666(a)(3)(B) because she had invoked the protection of this statute when she disputed owing the debt and demanded copies of the charge tickets evidencing the debt. Her dispute of the debt was made on the very first day that she was notified that any charges were due and owing on the account. She disputed the debt both in the telephone conversation with the collector from the bank and in writing on that same date. This

section prevents any attempt to collect the debt until the creditor complies with its obligation to furnish the requested documentation to the customer. By agreement with the bank, Walker's name was to have been removed from the account when it had been paid in full. Evidence of the agreement was before the trial court and accepted by the Supreme Court of Alabama as noted in its statement of facts. Walker did not allege that the law firm was to be held accountable under 15 U.S.C. Section 1666(a)(3)(B), but since the law suit was brought by the attorney's client in violation of that statute, the attorney was guilty of malicious prosecution when he knew or should have known that Walker had a complete and total defense against the action taken by the bank. Walker repeatedly stated throughout the case she was not holding the law firm accountable for damages under that statute, she was holding them responsible for the tort of malicious prosecution. The circuit judge failed to understand that concept, as well as The Supreme Court of Alabama. Walker is deprived of due process when the court made a decision without understanding the facts or the law.

The Supreme Court of Alabama erred in its state-

ment of facts when it said that Walker obtained a final judgment against the bank's claim in July 1991. In fact, Walker only obtained an interlocutory judgment against the bank in July 1991 and did not obtain a final judgment against the bank until the jury rendered its decision on March 20, 1992. The State of Kansas requires that the judgment be final prior to the initiation of a malicious prosecution suit. Hunt v. Dresie, 740 P.2d 1046 (Kan. 1987). For over 100 years Alabama required a final termination of the underlying case as an element of malicious prosecution. If a termination of the underlying case was not final, then the court could not issue a summary judgment with prejudice terminating the right of Walker to bring suit when the cause of action later became ripe for prosecution.

Alabama is shielding Stephen R. Windom from malicious prosecution illegally when it refuses to allow a decision on malice to be made by a jury. It allows the jury to infer malice from the lack of probable cause in actions against non-attorneys. The Walker case originated in Baldwin County, Alabama and she cites another Baldwin County case of malicious prosecution as being similar in circumstances, but not involving mali-

cious prosecution against an attorney to show that she is not being treated equally under the law. This case is Empiregas, Inc. of Elberta v. Feely, 524 So.2d 626 (1988). The attorney for Empiregas brought suit against Feely when he knew that Feely had a complete and total defense to the suit. The defense was the statute of limitations. The questions of probable cause and malice were properly taken before the jury.

There were two compelling reasons why Windom should not have brought suit against Walker. The first was that she was not an obligor to the bank and the second was that Title 15 U.S.C. Section 1666(a)(3)(B) provided a complete and total defense against the suit until the creditor complied with the statute. The creditor failed to comply with the statute before the suit. The statute normally protects parties obligated on a credit card debt, but it has been held that when the creditor creates an account in the name of a party who has no account and reports the delinquent obligation to other parties that for the purposes of law, that party is afforded protection under 15 U.S.C. Section 1666. Saunders v. Ameritrust of Cincinnati, 587 F.Supp. 896 (1984). Walker claimed protection under that statute

and was not subject to suit until the creditor complied with the statute. Windom was not aware of either of the defenses because he had done no investigation.

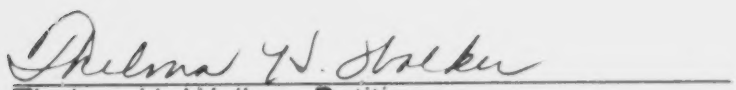
An attorney cannot avoid a suit for malicious prosecution because he willfully remained ignorant of the law and the facts. However, in Walker v. Windom, the Supreme Court of Alabama now holds the position that you cannot infer malice when an attorney willfully remains ignorant of the law and facts through no investigation. This is a discriminatory change in Alabama law that allows unequal treatment under the law. That is not constitutional and the decision must be reversed.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of The Supreme Court of Alabama in this matter.

Dated: May 5, 1993.

Respectfully submitted,



Thelma H. Walker, Petitioner

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Petitioner,

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STEPHEN R. WINDOM
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Respondents.

PROOF OF SERVICE

I, Thelma H. Walker, do swear or declare that on this date, May 5, 1993, pursuant to Supreme Court rules 29.3 and 29.4, I have served the attached PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addresed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Fred K. Granade
Stone, Granade, Crosby & Blackburn, P.C.
P. O. Drawer 1509
Bay Minette, Alabama 36507-1509

Thelma H. Walker

Thelma H. Walker, Affiant

Subscribed and Sworn to Before Me
this 5th day of May, 1993.

Notary Public in and for said
County and State
My commission expires: 8-23-95